

1
2
3
4
5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 CLYDE A. ARTERBURN, an individual,

9 Plaintiff,

10 v.

11 HOME DEPOT U.S.A., INC. dba/aka Home
12 Depot, a Foreign Corporation,

13 Defendant.

14 Case No. C22-408-RSM

15 ORDER GRANTING MOTION TO
16 EXCLUDE TESTIMONY OF EXPERT
17 JOHN R. PETERSON

18 This matter comes before the Court on Defendant Home Depot U.S.A., Inc.'s Motion to
19 Exclude Testimony of John R. Peterson. Dkt. #27. Plaintiff Arterburn opposes. Dkt. #35.

20 The original deadline for expert witness disclosure was December 14, 2022. Dkt. #10 at
21 1. The Court extended the deadline for disclosure of Plaintiff's experts to May 17, 2023, with
22 rebuttal experts to be disclosed by July 17. Dkt. #22. Rule 26(a)(2) requires expert witnesses
23 like Mr. Peterson to provide a written report to accompany disclosure. Plaintiff did not disclose
24 Mr. Peterson's report until July 17, 2023. *See* Dkts. #24 and #25. July 17 was also the last day
25 of discovery. Dkt. #22. A jury trial is currently set for November 13, 2023. *Id.*

26 Mr. Peterson's report does not rebut the opinions of a defense expert witness until page
27 26. *See* Dkt. #26-3. The first 25 pages were clearly drafted as the type of expert report the
28 Court would expect to see filed by the initial deadline for expert witnesses.

Under Federal Rule of Civil Procedure 37(c)(1), “if a party fails to provide information or identify a witness required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence... at a trial, unless the failure was substantially justified or is harmless.” The rule discusses additional or alternative sanctions available on motion.

Mr. Peterson was clearly not hired as a rebuttal expert. The Court knows this because of the content and design of his report, as discussed above, and because Plaintiff does not so argue. Dkt. #35 at 1. (“Plaintiff concedes that the expert report... was not timely produced.”) The Court finds that the disclosure was untimely under Rule 26(a)(2). The most obvious sanction would be to exclude this witness.

Plaintiff cites the legal standard for a court to consider dismissal as a sanction, *see id.* at 2. This is the incorrect standard because the Court is considering excluding a witness, not dismissal of Plaintiff’s claims. Instead, exclusion of an improperly disclosed expert is “automatic,” unless “the failure to disclose was substantially justified or harmless.” *See Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 826 (9th Cir. 2011).

There are various factors to consider in determining whether or not the failure to disclose was substantially justified, however Plaintiff fails to provide *any* explanation for why Mr. Peterson was not disclosed in a timely fashion. The Court concludes that it was not substantially justified. Plaintiff says this “can be rendered harmless” by reopening discovery to allow for a deposition of Mr. Peterson “at Plaintiff’s expense.” Dkt. #35 at 2. This strikes the Court as inadequate for two reasons. First, reopening discovery would substantially delay this case, set for trial next month. Second, Defendant’s financial burden would go beyond the cost of conducting Mr. Peterson’s deposition; it would have to pay for its own expert to rebut Mr.

1 Peterson's opinions and for defense counsel to revise preparations for trial. None of this is
2 adequately addressed. The Court concludes that the failure to timely disclose was not harmless.
3

4 Plaintiff fails to move for any alternative sanction. The Court cannot imagine a more
5 appropriate sanction and would not continue trial over the objection of Defendant given that
6 trial has already been continued twice.
7

8 The Court need not address Defendant's many other reasons for excluding this witness.
9

10 Given all of the above, and having reviewed the relevant briefing and the remainder of
11 the record, the Court hereby finds and ORDERS that Home Depot's Motion to Exclude
12 Testimony of John R. Peterson, Dkt. #27, is GRANTED.
13

14 DATED this 2nd day of October, 2023.
15



16 RICARDO S. MARTINEZ
17 UNITED STATES DISTRICT JUDGE
18
19
20
21
22
23
24
25
26
27
28